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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

CONTINENTAL/AIR MICRONESIA AND CONTINENTAL AIRLINES, INC.,

Petitioners,

v.

NATIONAL MEDIATION BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Are National Mediation Board interpretations of the Railway Labor Act which disregard the statute's language and majority rule principle insulated from judicial review by *Switchmen's Union v. National Mediation Board*, 320 U.S. 297 (1943)?

PARTIES

The petitioners are Continental Airlines, Inc. and Continental/Air Micronesia. The United Micronesia Development Association, a corporation incorporated in the commonwealth of the Northern Mariana Islands, owns 100% of the stock of Air Micronesia, Inc. Continental Airlines Holdings, Inc. owns 100% of the stock of Continental Airlines, Inc.

Respondent National Mediation Board is an independent agency in the executive branch of the United States government, charged with investigating and conducting employee representation elections of rail and air carriers under the Railway Labor Act, mediating disputes about formation of agreements, and facilitating arbitration of disputes about interpretation of contracts.

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v.

NATIONAL MEDIATION BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Continental/Air Micronesia and Continental Airlines, Inc. (hereafter "Air Micronesia" and "Continental" respectively) request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on March 17, 1992.

OPINIONS BELOW

The judgment of the court of appeals is reproduced at Pet. App., at 1a. Although there is no written opinion, the memorandum order affirming the district court is reported at

957 F.2d 911. The opinion and order of the district court (Pet. App., at 4a) are not reported. The order of the National Mediation Board (Pet. App., at 15a) is reported at 18 N.M.B. 40.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

45 U.S.C. § 152, Fourth:

> Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter.

45 U.S.C. § 152, Ninth:

> If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the

employees involved in the dispute, and certify the same to the carrier. . . . In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

STATEMENT OF THE CASE

This case involves whether judicial review is available to ensure that the National Mediation Board ("NMB" or "Board") fulfills one of its two primary statutory duties: safeguarding employee rights to determine their bargaining representatives.[1] The courts below, relying upon decisions applying the Court's decision in *Switchmen's Union v. National Mediation Board*, 320 U.S. 297 (1943), insulated from judicial review an NMB decision that disregarded both the statute's language and its vital majority rule principle.

The Union of Flight Attendants ("UFA"), a small, local union, represented only Continental Airlines and Air Micronesia flight attendants under two separate NMB certifications obtained pursuant to NMB elections conducted in 1982 and 1983. In the fall of 1983, Continental entered bankruptcy and UFA instituted an unsuccessful strike against Continental. During the strike, in February 1984, UFA entered into a "Merger Agreement" which provided that UFA would be absorbed into the International Association of Machinists and Aerospace Workers of America, AFL-CIO ("IAM"). Under the Merger Agreement, UFA ceded all independence to IAM in exchange for IAM's promises of financial assistance to the UFA: a $30,000 per month allowance; the payment of salaries for UFA's employees and business representatives; and IAM's assumption of all UFA's litigation and bankruptcy fees and expenses. IAM is a major international union which represents hundreds of thousands of employees in many industries under a constitution and hierarchial structure significantly different from that of UFA.

During March 1984, UFA conducted a "merger agreement election" by mail ballot; neither the NMB nor any independent authority designated by the NMB ever verified

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1 The other duty, mediation of "major" disputes between carriers and unions, is not involved in this case.

the accuracy of the list of eligible voters, their mailing addresses, or the integrity of the balloting process. Only 47.6% (1,238 of 2,615) of the employees who were sent ballots returned them and only 41.1% (1,077) of the flight attendants polled voted in favor of the merger. UFA mailed ballots to only 33 of the 59 flight attendants then employed by Air Micronesia (which had been certified as a separate bargaining unit by the NMB). No separate records were maintained concerning whether any Air Micronesia flight attendants voted and, if so, whether they voted for or against the proposed merger.

Five and one-half years after the "merger agreement election,"[2] on September 13, 1989, the UFA and IAM requested that the NMB transfer to the IAM the two certifications for UFA to represent the Continental and Air Micronesia flight attendants. This request was granted on October 31, 1990. Pet. App., at 15a. The Board made no effort to determine independently the wishes of affected employees, but merely accepted the representations of the interested unions as to employee wishes. By the date of NMB approval of the transfer request, Continental's workforce had approximately 6,300 affected employees, only 1,000 of whom were employed at the time of the union election in 1984.

The courts below upheld the Board's decision on the ground that judicial review in RLA cases was precluded by precedents based on the Court's decision in *Switchmen's Union*. Judge Charles R. Richey, for the District Court for the District of Columbia, found that "None of the alleged violations advanced by the plaintiffs rise to a 'constitutional dimension or gross violation of the [RLA]'" and concluded that "the Court lacks the power to grant the plaintiffs relief." Pet. App., at 12a. The Court of Appeals for the District of

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2 According to the IAM, this delay was caused by internal union policies, not by Continental or Air Micronesia. During the interim period, it was the UFA, not the IAM, that acted as the collective bargaining representative of the flight attendants.

Columbia (Judges Wald, Sentelle and Henderson) summarily affirmed the District Court, noting that "court review of NMB decisions is 'one of the narrowest known to the law'" and that a "peek at the merits" revealed no "gross violation of the statute" by the NMB. Pet. App., at 2a.

REASONS FOR GRANTING THE WRIT

The courts below erroneously precluded judicial review of NMB certification of the IAM when, so far as anyone knows, *none* of Air Micronesia's and only a very small fraction of Continental's employees ever expressed any desire to be represented by that union. Judicial review is necessary to prevent the Board from ignoring the statutory language and disregarding the central premise of the statute it is charged with enforcing: that it may certify a union to represent employees *only* if it ensures that a majority of the employees involved support that representation. The Board itself was clear as to the implications of the present situation where judicial review is, for all practical purposes, impossible. It claimed not only the "unfettered discretion to determine how to ascertain employee preference" but also "the power to determine *whether* to ascertain employee wishes at all." Defendant's Reply To Plaintiff's Opposition to Defendant's Motion to Dismiss or for Summary Judgment, at 11 (emphasis added).

I. THE COURT'S DECISIONS HAVE BEEN MISAPPLIED TO PRECLUDE JUDICIAL REVIEW OF NMB INTERPRETATIONS OF THE RLA

The Court has not yet examined whether Board practices which deny employees an opportunity to select representatives of their choice are subject to judicial review. Moreover, the decision of the Court upon which the courts below ultimately premised preclusion of review does not stand for that proposition. *Switchmen's Union* involved a jurisdictional dispute between two unions competing to

represent certain "yardmen" employed by two railroad companies. When the NMB decided that "all yardmen in the service of a carrier should select a single representative for collective bargaining" rather than being divided into subgroups of yardmen to bargain separately, the Court held that the district court "did not have the power to review the action of the National Mediation Board." *Id.* at 299-300. The holding in *Switchmen's Union* merely prevents judicial second-guessing of Board decisions to place employees in one bargaining unit or another.[3]

Justice Douglas' language for the 4-3 majority swept more broadly, however. Indeed, contrary to modern administrative law concepts, Justice Douglas denied that the federal judiciary should have "the final say on any aspect of the problem" of disputes in the transportation industry. *Id.* at 303.[4]

Ironically, two companion cases to *Switchmen's Union* demonstrated the Court's awareness that claims that the NMB ignored employee desires in representation cases contrary to RLA policy should be subject to judicial review.

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3 The *Switchmen's Union* Court itself, saying that such a situation is "not now before us," implied that judicial review would have been available to a *carrier* contesting an improper certification. 320 U.S. at 307.

4 Justice Reed's dissent focused upon the reasons for judicial review of agency interpretations of law:

> Where duties are delegated, as here, to administrative officers, those administrative officers are authorized to act only in accordance with the statutory standards enacted for their guidance. Otherwise we should risk administrative action beyond or contrary to the legislative will.

Switchmen's Union, 320 U.S. at 312. Obviously concerned at the broad reach of Justice Douglas' language, Justice Reed expressed his fear that "the court authorizes the Mediation Board to determine not only questions judicially found to be committed to its discretion . . . but the statutory limits of its own powers as well." *Id.* at 321.

General Committee of Adjustment v. Missouri-Kansas-Texas R.R., 320 U.S. 323, 334 (1943) (no jurisdiction to review NMB decision involving a jurisdictional dispute but "[T]he principle of majority representation is not challenged [here]."); *General Committee of Adjustment v. Southern Pacific Co.*, 320 U.S. 338, 344 (1943) ("Congress left the so-called jurisdictional controversies between unions to agencies or tribunals other than the courts . . . [W]hether different considerations would be applicable in case an employee were asserting that the Act gave him the privilege of choosing his own representative for the prosecution of his claims is not before us.").[5]

This case poses those "different considerations" left open in the 1943 RLA trilogy, for the courts below improperly precluded review of a Board decision which, among other things, (1) disenfranchised more than 80% of the current employees of Petitioners on the question of representation by the IAM, (2) certified the IAM with no showing that more than 50% of Petitioner Continental's employees *ever* desired such representation and (3) permitted the IAM to represent Petitioner Air Micronesia's employees with no showing that *any* of them desired such representation.

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5 Limiting *Switchmen's Union* as we urge would avoid constitutional questions. Professor Henry Hart, in his seminal "Dialog" dealing with the constitutional underpinnings of the right to judicial review, implied the *Switchmen's Union* restrictions on judicial review might be constitutionally permissible *only* because *Switchmen's Union* was a jurisdictional case in which two unions sought exclusive bargaining rights. Unlike the carrier whose contract and property rights are limited by this statutory scheme, the unions in a jurisdictional dispute lose nothing apart from what they could acquire under Section 2, Ninth. Hart & Wechsler's Federal Courts and the Federal System, 345-46 (2d ed. 1976). *See also* Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 916, 976-982 (1988) (criticizing *Switchmen's Union* on Article III grounds for locating judicial power in executive hands).

Unfortunately, this is not an isolated instance of a lower court's misuse of *Switchmen's Union*.[6] The Court's guidance is necessary because *Switchmen's Union* has been expansively applied by the lower courts to preclude judicial review in a wide range of RLA cases, effectively insulating from meaningful judicial review all NMB decisions of whatever character.[7] Indeed, while lower courts have often criticized the NMB,[8] the Courts of Appeals have overturned

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6 Another certiorari petition is currently pending before the Court concerning the reach of *Switchmen's Union*. *Virgin Atlantic Airways, Ltd. v. National Mediation Board*, No. 91-1873 (Filed May 19, 1992).

7 *See, e.g., Virgin Atlantic Airways, Ltd. v. IBT*, 956 F.2d 1245 (2d Cir. 1992) (NMB includes as eligible voters individuals having no employment relationship with carrier); *USAir, Inc. v. NMB*, 894 F.2d 403 (4th Cir. 1989) (NMB refuses to investigate carrier's allegations of union election interference); *Professional Cabin Crew Ass'n v. NMB*, 872 F.2d 456 (D.C. Cir.), *cert. denied*, 493 U.S. 974 (1989) (NMB counts unreinstated strikers as eligible voters); *IAM v. Trans World Airlines, Inc.*, 839 F.2d 809 (D.C. Cir.), *cert. denied*, 488 U.S. 820 (1988) (NMB denies statutory duty of neutrality); *Yardmasters v. Harris*, 721 F.2d 1332 (D.C. Cir. 1983) (NMB operates with only one member, despite statutory requirement of two member quorum); *British Airways Bd. v. NMB*, 685 F.2d 52 (2d Cir. 1982) (NMB cut-off date two years before election; no counting of mislaid ballots); *Air Canada v. NMB*, 478 F. Supp. 615 (S.D.N.Y. 1979); *Aeronautical Radio, Inc. v. NMB*, 380 F.2d 624, 626-27 (D.C. Cir.), *cert. denied*, 389 U.S. 912 (1967) (NMB defines meaning of "majority"); *Teamsters v. NMB*, 363 F.2d 311 (D.C. Cir.), *cert. denied*, 385 U.S. 929 (1966) (NMB concludes unions have no constitutional right to campaign); *WES Chapter, FEIA v. NMB*, 314 F.2d 234, 236-37 (D.C. Cir. 1962) (NMB determines eligibility of strikers to vote); *UNA Chapter, FEIA v. NMB*, 294 F.2d 905 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 956 (1962) (NMB investigating committee proceeds on *ex parte* basis).

8 *IAM v. Trans World Airlines, Inc.*, 839 F.2d 809, 812 (D.C. Cir.), *cert. denied*, 488 U.S. 820 (1988) ("treatment of these employees certainly does not cast the NMB in a very favorable light"); *Sedalia-Marshall-Boonville Stage Line, Inc. v. NMB*, 574 F.2d 394, 396 n.3, 399 n.5 (8th Cir.), *cert. denied*, 439 U.S. 881 (1978) ("NMB's authority and procedures are out of tune with the realities of modern day labor-management relationship and current due process concepts . . . . It is unfortunate that the statutes, and cases interpreting them, permit such unilateral and arbitrary imposition of a union upon a carrier without a hearing of any sort."); *Teamsters v. BRAC*, 402 F.2d 196, 204 (D.C. Cir.), *cert. denied*, 393 U.S. 848 (1968) ("[C]ourts must put aside the kinds of disquietude that we have sketched in deference to the doctrine of *Switchmen's Union* . . ."); *BRAC v. NMB*,

(continued . . .)

NMB decisions only twice in the 49 years since *Switchmen's Union* was decided.[9] Not surprisingly, as discussed herein at pp. 14-16, this lack of review has led the NMB to disregard the desires of a majority of affected employees, to ignore the language and policy of the RLA and, without explanation, to abandon its own prior decisions.

Such broad readings of *Switchmen's Union* conflict with *Brotherhood of Ry. & S.S. Clerks v. Association for the Benefit of Non-Contract Employees*, 380 U.S. 650 (1965) (*"Railway Clerks"*). In *Railway Clerks*, the Court permitted review to see if the Board performed its statutory duty to "investigate" a dispute. The extent to which the Board totally ignored statutory duties and employee desires in this case goes far beyond the Board transgressions of the Railway Labor Act alleged in *Railway Clerks*. Here the Board failed to perform any investigation concerning the wishes of current employees or into the *bona fides* of the alleged election. *See infra* at pp. 14-15, n. 17. Indeed, the Board had absolutely no involvement in the 1984 "merger agreement election" conducted by an interested union, despite the fact that it had the statutory duty to either conduct the election itself or appoint a committee of neutrals to do so.[10]

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8 (...continued)
374 F.2d 269, 275 (D.C. Cir. 1966) ("Board's letter was unfortunate and even vexing . . ." in that Board did not make sufficient effort to wipe out union fraud, but still not sufficient "predicate for the court's exceptional jurisdiction . . .").

9 *International In-Flight Catering Co. v. NMB*, 555 F.2d 712 (9th Cir. 1977) (NMB certified union based on cards, where employees only authorized an election); *Russell v. NMB*, 714 F.2d 1332, 1341 (5th Cir. 1983), *cert. denied*, 467 U.S. 1204 (1984) (NMB "breached its clear statutory mandate" when it refused to process application for election). Now on appeal to the Ninth Circuit is a third case, *America West Airlines, Inc. v. NMB*, 743 F. Supp. 693 (D. Ariz. 1990) (NMB improperly notified employees that the carrier violated the Act).

10 *See also Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 489 U.S. 426, 441 (1989) (*"TWA"*), ("judicial intervention in RLA procedures [is] limited to those cases where 'but for the general jurisdiction of the (continued...)

Such an expansive interpretation of *Switchmen's Union* is also inconsistent with two subsequent Congressional enactments which presume judicial review: the Administrative Procedure Act ("APA") of 1946 (5 U.S.C. § 551 et. seq.) and the 1976 amendments to 28 U.S.C. § 1331. The APA provides that "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion--(a) * * * Any person suffering a legal wrong because of any agency action * * * is entitled to judicial review thereof." 5 U.S.C. § 702. Both the Senate and House Reports on the APA unmistakably reaffirm the strong presumption of judicial review: "Legislative intent to forbid judicial review must be, if not specific and in terms, at least clear, convincing, and unmistakable under this bill. The mere fact that Congress has not expressly provided for judicial review would be completely immaterial." S. Doc. No. 248, 79th Cong., 2d Sess. 368 (1946); "To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially for judicial review is certainly no evidence of intent to withhold review." H.R. Rep. No. 1980, 79th Cong. 2d Sess. 275 (1946).[11]

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10 (...continued)
federal courts there would be no remedy to enforce the statutory commands which Congress had written into the Railway Labor Act.'"). The courts below limited this exception to "gross violations" of the statute, presumably permitting the Board to misconstrue the RLA or commit "ordinary" violations of the statute.

11 *Railway Clerks* and *TWA, supra,* provide no guidance on the relevance of the APA to judicial review of Board interpretations of the RLA, for neither references the APA. Two panels of the Court of Appeals for the District of Columbia have reached divergent conclusions as to this issue. Compare *Kirkland v. Atlantic Coast Line R.R.*, 167 F.2d 529, 530 (D.C. Cir.), *cert. denied*, 335 U.S. 843 (1948), (RLA "gives clear and convincing evidence of intent to withhold judicial review") with *Air Line Dispatchers Ass'n v. National Mediation Board*, 189 F.2d 685, 689 (D.C. Cir.), *cert. denied*, 342 U.S. 849 (1951) ("since there is no explicitness in the Railway Labor Act or indication in its history of a Congressional intention to leave it exclusively to Board determination," APA commands judicial review).

A central purpose of the second statute, Pub. L. No. 94-574 (amending 28 U.S.C. § 1331 to eliminate the minimum amount in controversy requirement), was to fill "an unfortunate gap in the statutory jurisdiction of the Federal courts." H.R. Rep. No. 94-1656, 94th Cong., 2d Sess. 14 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6121, 6135. Though the amendment did not affect such limitations on judicial review as lack of standing,[12] Congress was concerned that litigants challenging agency action not face "a denial of any [judicial] remedy whatsoever." *Id.* at 15. As the Court said in *Califano v. Sanders*, 430 U.S. 99, 105 (1977), "The obvious effect of this modification [to 1331], subject only to preclusion-of-review statutes created or retained by Congress, is to confer jurisdiction on federal courts to review agency action, regardless of whether the APA of its own force may serve as a jurisdictional predicate."

Indeed, the decision below is so irreconcilable with the Court's presumption of judicial review that, if *Switchmen's Union* is not limited as argued herein, it should be overruled.[13] *See, e.g., Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) ("judicial review of a final agency action by an aggrieved person will not be cut off unless there is

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12 Any question as to the carrier's interest in, and standing to challenge, the NMB's certification of a union was resolved in *Railway Clerks, supra*, when this Court granted certiorari on the question of the carrier's standing and entertained merits claims of the carrier. *Accord British Airways Bd.*, 685 F.2d at 54-55. *International In-Flight Catering Co. v. NMB*, 555 F.2d 712, 719 (9th Cir. 1977) (carrier standing to challenge "unlawfully and allegedly improperly certified bargaining representative.").

13 *Switchmen's Union* was first extensively criticized in Louis L. Jaffe, *The Right to Judicial Review I*, 71 Harv. L. Rev. 401 (1958). Professor Jaffe noted that "The starting point of Mr. Justice Douglas' opinion is significant. Both in its attitude and in the result to which it leads, it contradicts or ignores what I have called the presumption of reviewability." *Id.* at 429. Because the case is so at odds with this presumption, he observed, it has "borne little fruit," *Id.* at 430, in other areas of the law. As demonstrated in this petition, however, it has had a profound effect in undermining the rights of employees to select their representatives under the RLA.

persuasive reason to believe that such was the purpose of Congress"); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986) ("We begin with the strong presumption that Congress intends judicial review of administrative action").[14]

Finally, limiting *Switchmen's Union* to disputes not involving Board disregard for the RLA's fundamental majority rule principle would have the salutary effect of submitting NMB interpretations of the RLA to the same level of judicial review as National Labor Relations Board ("NLRB") interpretations of the National Labor Relations Act ("NLRA").[15] Judicial review of the NMB is even more needed to protect employee free choice in light of (1) the RLA provision which permits a mandatory union shop, 45 U.S.C. § 152, Eleventh; (2) the absence of a statutory mechanism to permit decertification of a union once certified, *see Russell v. NMB*, 714 F.2d 1332 (5th Cir. 1983), *cert. denied*, 467 U.S. 1204 (1984); and (3) the Board's stated view that the RLA does not require that the Board remain "neutral" in representation cases. *See IAM v. Trans World Airlines, Inc.*, 839 F.2d 809 (D.C. Cir.), *cert. denied*, 488 U.S. 820 (1988).

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14 Recent academic commentary strongly supports the Court's presumption of review. *See, e.g.*, Cass R. Sunnstein, *Interpreting Statutes*, 103 Harv. L. Rev. 407, 475 (1989) ("[C]ourts presume that the Legislature has not precluded judicial review of agency decisions. This presumption is partly attributable to a belief–vindicated by recent experience–that regulatory agencies are susceptible to factionalism and self-interested representation. Judicial review operates as both an ex ante deterrent against dangers of this sort and an ex post corrective. If Congress is to eliminate judicial review, it must do so unambiguously.").

15 When the NLRB designates an appropriate unit, broad discretion is given to such determinations. *NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 494 (1985) (NLRB has broad discretion to determine the appropriate bargaining unit). Conversely, NLRB interpretations of the NLRA are subjected to traditional standards of judicial review.

II. LACK OF JUDICIAL REVIEW HAS PERMITTED THE NMB TO DISREGARD THE RLA'S LANGUAGE AND MAJORITY-RULE PRINCIPLE

"Freedom of choice in the selection of representatives on each side of the dispute is the essential foundation of the [RLA] statutory scheme." *General Committee of Adjustment v. Missouri-K-T R.R.*, 320 U.S. 323, 329-30 (1943), *quoting Texas, N.O. R.R. v. BRAC*, 281 U.S. 548, 567 (1930). Congress explicitly provided in Section 2, Fourth of the RLA, 45 U.S.C. § 152, Fourth, that "Employees shall have the right to organize and bargain collectively *through representatives of their own choosing.*" (emphasis added). As this Court noted in *Switchmen's Union*, employee freedom of choice is protected by Section 2, Ninth, which provides that the NMB may use any "appropriate means" to determine employee wishes on representation issues, but that *"In the conduct of any election . . . the Board shall designate* who may participate in the election and establish the rules to govern the election or may appoint a committee of three neutral persons . . . ." 45 U.S.C. § 152, Ninth (emphasis added).[16] Without examining the wishes of any employees, conducting any election, establishing any rules to govern the election or appointing any committee of neutrals, the Board relied upon an outdated election conducted

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16 Legislative history confirms that Congress intended a neutral agency, not interested parties, to oversee the selection of representatives. *See* Hearings on H.R. 7650 Before the Interstate and Foreign Commerce Committee, 73d Cong., 2d Sess. 40 (1934): "the only way in which you can cover that matter adequately is to give a neutral and impartial and independent board the right to determine those matters. . . you have got to delegate that duty to an impartial neutral independent organization representing the Government." (Commissioner Eastman, principal draftsperson of the RLA).

by the interested parties and certified the IAM to represent Petitioners' employees.[17]

The Board has consistently agreed that the present matter is a representation dispute subject to Section 2, Ninth of the RLA which, as noted above, is the statutory section that imposes various obligations on the Board to protect employee choice. The Board's decision not to ascertain employee wishes is directly traceable to its erroneous interpretation that a "transfer case" is somehow unique under Section 2, Ninth and does not require the Board to consider the wishes of affected employees. Yet, in at least 16 published decisions from 1951 through 1982, the Board interpreted the RLA to require processes designed to ascertain that a transfer of a certification was desired by a majority of the employees involved.[18] In the early 1980s, however, the

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17 In addition to abandoning its statutory duty to conduct the election or appoint a committee of neutrals to do so, the Board argued below that passive "review" of the union's transfer request letters alone met its statutory duty to "investigate" the representational dispute. If no more is required by this Court's decision in *Railway Clerks, supra,* the Board's duty to investigate has also been rendered irrelevant. Some of the more glaring omissions of the Board's purported investigation were (1) failure to ascertain whether there was any integrity to the ballots cast in the UFA poll, (2) failure to ascertain whether then-current employees obtained ballots, (3) failure to evaluate separately the votes of Air Micronesia flight attendants, and (4) failure to establish any mechanism for determining the desires of the current workforce. The NMB transferred the certifications after a five-and-a-half year hiatus between the UFA poll and the request that the Board transfer the UFA certifications to the IAM, despite the Board's recognition of a need for "closer scrutiny" of an election held so long ago and contrary to its own "staleness" rule which prohibits consideration of employee authorization cards which are more than one year old. 29 CFR § 1206.3.

18 For example, when the Air Line Pilots Association ("ALPA") asked the NMB to transfer certifications from ALPA to the newly formed Association of Flight Attendants ("AFA") in 1974, the Board refused to do so merely upon the unions' request. The Board instructed ALPA that "it cannot transfer or amend certifications simply through an agreement between ALPA and its affiliate AFA because under such circumstances the Board has no evidence that the change in representation of employees has the consent of employees involved." Letter from NMB Executive Secretary R.K. Quinn, Jr. to Edward J. Hickey dated Dec. 4,

(continued...)

Board, without explanation, began transferring certifications from one union to another without conducting elections or examining authorization cards from current employees.[19] Such an unexplained change of practice normally would be given little deference by courts reviewing it for consistency with the statute. However, the courts below, relying on decisions applying *Switchmen's Union*, gave dispositive effect to the Board's new transfer cases practice, ignoring both the fact that the Board had changed its practice and the absence of any analysis to justify the change.

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18 (...continued)
1974. The NMB insisted upon a procedure whereby flight attendants affected by the change signed cards authorizing representation by AFA; the Board verified that a majority of those eligible to vote at each carrier had indeed signed cards before transferring the certification. *E.g.*, *Texas International Airlines*, 5 N.M.B. 196 (1976); *Western Airlines, Inc.*, 6 N.M.B. 754 (1979). *Accord, Continental Airlines, Inc.*, 8 N.M.B. Supp. A. 709, 713 (1977) ("The Board refused to transfer the certification on the basis of a private election.") *Ross Aviation*, 9 N.M.B. 162 (1982) (requiring proof that majority of employees assented to transfer of certification); *Pennsylvania R.R.*, 2 N.M.B. 204 (1951) (same).

19 *See Transtar Pilots Ass'n*, 14 N.M.B. 377 (1987), *BRAC*, 13 N.M.B. 408 (1986), *Prinville Ry. Employees Union*, 13 N.M.B. 398 (1986); *UTU*, 13 N.M.B. 6 (1985); and *UTU*, 11 N.M.B. 228 (1984).

CONCLUSION

If judicial review is precluded here, the RLA's premise that employees will be represented by unions of their own choosing, or by no union at all if that is their choice, will successfully have been negated by the Board. For the reasons above, the writ should be granted.

Respectfully submitted,

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June 15, 1992

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 91-5189 September Term, 1991

Continental Airlines, Inc.
Air Micronesia, 91-00796

Appellants

v.

National Mediation Board

and consolidated case No. 91-5190

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Before: Wald, Sentelle, and Henderson, *Circuit Judges*

JUDGMENT

This case was considered on the record and on the briefs and oral argument of counsel. The Court has determined that the issues presented occasion no need for a published opinion. *See* D.C. Cir. R. 14(c).

Continental Airlines, Inc., and Continental/Air Micronesia appeal from a final order of dismissal issued by the United States District Court. Appellants contend that the National Mediation Board (NMB) did not fulfill the requirements of the Railway Labor Act (RLA), 45 U.S.C. § 152, Ninth, when it conducted an investigation of an election held by the Union of Flight Attendants to gauge member opinion on a merger with the International Association of Machinists and Aerospace Workers (IAM). The NMB responds that § 152, Ninth, governs its investigation of requests by unions to transfer their certification to reflect a merger, and that the NMB's investigation and subsequent certification transfer fully complied with the requirements of § 152, Ninth. We have repeatedly noted that court review of NMB decisions is "one of the narrowest known to the law." *IAM v. TWA*, 839 F.2d 809, 811 (D.C. Cir. 1988). Congress established the NMB to be the body primarily responsible for handling disputes arising under the RLA. As the District Court properly noted below, Congress's intent that the NMB retain broad discretion over matters arising under the RLA allowed the Court merely a "peek at the merits" to determine whether the NMB committed to gross violation of the statute. *Continental Airlines, Inc. and Continental/Air Micronesia v. National Mediation Board*, No. 91-796, June 11, 1991, at 3, quoting *Teamsters v. Bhd. of Ry. Clerks*, 401 F.2d 196, 205 (D.C. Cir.), *cert. denied*, 393 U.S. 848 (1968). From the opinion below and the record, it is abundantly clear that the trial judge satisfied his obligation to "peek" and no more. Consistent with this standard of review and our precedent, it is

ORDERED and ADJUDGED that the grant of defendant's motion to dismiss or for summary judgment is affirmed.

The Clerk is directed to withhold issuance of the mandate herein until seven days after the disposition of any timely petition for rehearing. *See* D.C. Cir. R. 15(b)(2).

Per Curiam

For the Court:

Constance L. Dupré
Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Continental Airlines, Inc., and Continental/Air Micronesia	)	
Plaintiffs,	)	
v.	)	Civil Action No. 91-796 (CRR)
National Mediation Board,	)	
Defendant.	)	

OPINION OF CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

Before the Court are cross-motions for summary judgment.[1/] The plaintiffs, two air carriers, challenge the validity of a decision by the National Mediation Board ("NMB" or "Board") to transfer the certifications from an employee union to its successor after the merger of the two unions. The NMB argues that the Court lacks jurisdiction to grant the plaintiffs relief. After careful consideration of the parties' memoranda, the arguments of counsel, the underlying law, and the entire record herein, the Court shall grant summary judgment for the NMB and dismiss this case.

1/ On May 18, 1991, the defendant filed a Motion to Dismiss or for Summary Judgment. Because the defendant's motion refers to matters outside the pleadings, the Court shall treat the motion as one for summary judgment under Rule 56. *See* Fed. R. Civ. P. 12(c).

I. Background

There is no genuine dispute as to the material facts. On September 13, 1989, the Union of Flight Attendants ("UFA") and the International Association of Machinists & Aerospace Workers ("IAM&AW") requested that the NMB transfer certifications issued to UFA in NMB Case Nos. R-5352 and R-5337 to the IAM&AW after the merger of the two organizations. The NMB then investigated the circumstances of the IAM/UFA merger for one year.[2/] The Board considered hundreds of pages of evidence and also reviewed submissions by the plaintiffs attacking the validity of the union merger.

The Board concluded from its investigation that UFA had merged into the IAM in 1984; the UFA flight attendants had supported the merger in an internal ratification election by a vote of 1,077 to 161; the ratification vote was free of procedural irregularities; despite the five-year delay, the unions had timely filed a transfer request; and a transfer of certifications from UFA to IAM was appropriate. *See In Re: Rep. of Empl. of Continental Airlines and Air Micronesia--Flight Attendants,* 18 N.M.B. 40 (1990).

The plaintiffs filed the instant suit challenging the Board's decision on the ground that the Board failed to investigate properly the unions' request for a transfer of certifications. The plaintiffs argue that NMB violated the Railway Labor Act and the Constitution by basing its transfer decision on a union merger ratification vote which occurred in 1984 and which was based on a plurality vote.

2/ It is the practice of the Board not to use its election procedures in transfer request investigations. In most cases, the Board grants a transfer request based on assertions contained in the request letters. *See, e.g., Transtar Pilots,* 14 N.M.B. 377 (1987); *City of Prinevill Ry. Empl. Union,* 13 N.M.B. 398 (1986); *Bhd. of Ry. Airline & S.S. Clerks,* 13 N.M.B. 408 (1986); *United Transportation Union,* 13 N.M.B. 6 (1985); *United Transportation Union,* 11 N.M.B. 228 (1984).

II. Analysis

A. The Standard for Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure requires that the Court grant a motion for summary judgment if the pleadings and supporting affidavits and other submissions "show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." It is well established that the Court must believe the nonmovants' evidence and draw all justifiable inferences in their favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). However, "[t]he mere existence of a scintilla of evidence in support of the [nonmovants'] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmovants]." *Id.* at 252.

B. The Scope of Judicial Review

Under the Railway Labor Act ("RLA"), judicial review of a Board decision is "one of the narrowest known to the law." *Internat'l Ass'n of Machinists v. TWA*, 839 F.2d 809, 811 (D.C. Cir. 1988), *amended* 848 F.2d 232, *cert. denied*, 488 U.S. 20 (1988). A reviewing court only takes a "peek at the merits" to determine whether it is "obvious on the face of the papers" that the Board totally failed to undertake an investigation of a representation dispute. *Teamsters v. Bhd. of Ry. Clerks*, 402 F.2d 196, 205 (D.C. Cir.), *cert. denied*, 393 U.S. 848 (1968); *see Brotherhood of Ry. & S.S. Clerks v. Ass'n for the Benefit of Non-Contract Employees*, 380 U.S. 650, 661 (1965). The Court "is empowered to proceed no further" unless the "peek" reveals such an obvious error. *Prof. Cabin Crew Ass'n v. NMB*, 872 F.2d 456, 463 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 497 (1989).

The Court may review Board decisions which violate its "clear and mandatory" statutory duties, *Leedom v. Kyne*, 358 U.S. 184, 188 (1958), but only if the violation is obvious without the need for "arguing in terms of policy and broad generalities as to what the Railway Labor Act should provide." *Brotherhood of Ry. & S.S. Clerks*, 380 U.S. at 671; *see Prof. Cabin Crew*, 872 F.2d at 459; *Teamsters v. NMB*, 136 L.R.R.M. 2193, 2194 (D.D.C. 1990).

The central issue in this case is whether the NMB failed to carry out its statutory duty to investigate the representation dispute. *See Brotherhood of Ry. & S.S. Clerks*, 380 U.S. at 661 ("the Board's action here is reviewable only to the extent that it bears on the question of whether it performed its statutory duty to 'investigate' the dispute"). The focus of the inquiry is whether the Board investigated the dispute, not how it conducted its investigation:

> [R]eviewing a certification after an investigation by the NMB and reviewing whether the NMB made its statutory investigation at all are two completely different matters. While we cannot, and do not review the former, we can and do review the latter.

In-Flight Catering v. NMB, 555 F.2d 712, 717 (9th Cir. 1977). Here, the plaintiffs fail to meet their heavy burden of proving that the Board committed an error of "constitutional dimension or gross violation of the [RLA]." *Internat'l Brotherhood of Teamsters v. Brotherhood of Ry., Airline & S.S. Clerks*, 402 F.2d 196, 205 (D.C. Cir.), *cert. denied sub nom., Brotherhood of Ry., Airline & S.S. Clerks v. NMB*, 393 U.S. 848 (1968).

C. Plaintiffs' Contentions

At bottom, the plaintiffs advance three major arguments that the NMB's investigation violated the RLA. The plaintiffs complain the Board based its transfer decision on (1) a union's ratification vote (2) that occurred in 1984 and (3) in which a plurality of flight attendants supported the merger. Moreover, the plaintiffs argue that NMB violated the Constitution. However, the plaintiffs fail to demonstrate that the NMB violated a clear and mandatory duty, and therefore judicial review is unavailable. *See Teamsters,* 136 L.R.R.M. at 2194.

1. NMB Did Not Violate the RLA By Basing Its Transfer Order on the Union Merger Ratification Vote

The plaintiffs argue that RLA § 2, Ninth prohibits the Board from granting the request for transfer of certifications on the basis of the unions' merger ratification vote. This argument must fail. Section 2, Ninth provides in that conducting an *election,* the Board:

> shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after a hearing shall within 10 days designate the employees who may participate in the election.

While this language requires the Board to take certain steps when and if it decides to conduct an election, the RLA does not prohibit the Board from investigating the circumstances of a union merger ratification vote and granting a transfer of certifications based on that vote if the circumstances warrant. Section 2, Ninth imposes no "clear and mandatory" obligation

on the NMB to refrain from investigating the circumstances of a union merger vote and to abstain from granting a transfer of certifications based on that vote. *Cf. Teamsters*, 136 L.R.R.M. at 2194 (rejecting the analogous argument that the RLA imposed a clear and mandatory duty on the Board to refrain from investigating in the wake of a carrier request).[3/]

2. NMB Did Not Violate the RLA By Basing Its Transfer Order on Five-Year-Old Data

The plaintiffs allege that NMB violated the RLA by basing its transfer decision on the UFA's ratification vote, which had occurred five years before the Board's investigation.[4/] However, the plaintiffs fail to demonstrate that the Board violated any clear and mandatory provision of the RLA by using the five-year-old data. The resolution of the issues concerning the timeliness of the data was within the Board's discretion, and did not rise to a "gross violation of the statute." For example, in *British Airways Bd. v. NMB*, 685 F.2d 52 (2d Cir. 1982), the Court of Appeals held that "[s]electing a cutoff date, even though as events unfolded it

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3/ In addition to joining the arguments raised by Continental, plaintiff Continental/Air Micronesia alleges that the NMB failed to investigate in any way the choice of its flight attendants as a separate unit from the Continental flight attendants. Citing several election request cases, Continental/Air Micronesia concludes that the Board failed to perform its statutory duty to investigate the free choice of a majority of its flight attendants. However, the record shows that the NMB did conduct an investigation, and its decision regarding how to ascertain the level of participation of employees in a union ratification vote is within its discretion in a transfer request case. Continental fails to demonstrate that the Board violated a clear and mandatory provision of the RLA, and therefore judicial review is unavailable. *See Teamsters*, 136 L.R.R.M. at 2194-95 (and cases cited therein).

4/ Though noting that the transfer request deserved "closer scrutiny" because of the lapse of time, the Board determined that the unions had "acted reasonably under the circumstances" because a no-raiding provision in the AFL-CIO constitution had barred an earlier filing. *In Re: Representation of Employees*, 18 N.M.B. at 53.

was not possible to conduct the election until more than two years after the date, and counting ballots that reasonably appeared from postmarks to have arrived at the post office before the deadline were decisions well within [NMB's] discretion," and therefore the District Court had no jurisdiction to review NMB's certification in the election case. *Id.* at 55. *See also USAir v. NMB,* 711 F. Supp. 285 (E.D. Va.), *aff'd,* 894 F.2d 603 (4th Cir. 1989) (NMB's refusal to adjust voter eligibility cut-off dates for representation election to accommodate 197 employees not subject to judicial review). The Board was within its discretion in examining the circumstances surrounding the unions' delay in filing a petition and considering that petition "timely filed."

3. The RLA Did Not Prohibit the NMB from Basing its Transfer Order on a Plurality Vote

The plaintiffs also contend that NMB violated the RLA because the union merger ratification on which the NMB relied was based on a plurality vote and did not reflect the wishes of the majority of the employees. NMB found that 1,077 to 161 of the votes cast in the union merger ratification election favored the merger.

However, the plaintiffs argue that only 41% of those employees receiving ballots, and only 37% of those eligible to vote, voted in the election for merger ratification. Yet the plaintiffs fail to show that the Board abused its discretion and breached a clear and mandatory duty in determining that the vote reflected that the flight attendants supported the IAM/UFA merger. *Cf. Radio Officers' Union v. NMB,* 181 F.2d 801 (D.C. Cir. 1950) (relying on Attorney General opinion stating NMB has "the power to certify a representative which receives a majority of the votes cast despite the fact that less than a majority of those eligible voted"). Although almost 87% of the 1,245 employees who voted supported the merger, the plaintiffs argue that the Board

should have counted nonvoters as effectively voting against the merger. The plaintiffs conclude that NMB should have determined that the majority of employees were against the merger.

The plaintiffs fail to show that their logic is supported by the RLA. The RLA did not require an NMB-sponsored election in this transfer request case, and no statutory language prescribes how the NMB should assess the views of nonvoters in union elections.[5/] The method used by NMB to determine that the employees supported the union merger and the form of the ballot used by IAM in this case are not subject to judicial review. *Cf., Zantop Internat'l Airlines, Inc. v. NMB*, 732 F.2d 517, 522 (6th Cir. 1984) (election case holding that "neither the method by which the Board determined that a majority favored representation . . . nor the form of the ballot is subject to judicial review").

In sum, while NMB's procedures were not what the plaintiffs may have hoped for, its investigation was not "so inadequate to be a non-performance of its statutory duties" under the RLA. *See British Airways Bhd.*, 685 F.2d at 55.

4. NMB Did Not Violate the Constitution

In addition to alleging statutory violations, the plaintiffs argue that the Board violated the Free Speech Clause of the First Amendment and the Due Process Clause of the Fifth Amendment because its decision has "no basis in fact

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5/ Even in election cases, the NMB has discretion to treat a nonvoter as either (1) acquiescing in the will of the majority or (2) voting for no representation. Compare *Virginian Ry. v. System Federation*, 300 U.S. 515, 560 (1937) (upholding NMB certification because nonvoters "are presumed to assent to the expressed will of the majority of those voting") with *Ry. Clerks*, 380 U.S. at 670 (upholding practice in NMB-sponsored elections that "if the employee refuses to vote, he is treated as having voted for no representation"). The Board's practice in election request investigations to inform eligible voters that abstention from voting is a vote for no representation does not apply to a union merger ratification vote.

and law." The plaintiffs fail to show that the actions of the Board impinged on any rights protected by the Constitution, and their arguments are frivolous. *See Prof. Cabin Crew,* 872 F.2d at 463, n.4 ("We have carefully considered appellant's contention that the inclusion of the former strikers violated the current workers' First Amendment and due process rights. We find the argument totally without merit, and need spend no time refuting it."), *cert. denied,* 110 S. Ct. 497 (1989) (citing *Internat'l Ass'n of Machinists,* 839 F.2d at 812).

III. Conclusion

For all of the foregoing reasons, the Court shall grant the defendant's Motion to Dismiss or for Summary Judgment and shall dismiss this case from the dockets of the Court. None of the alleged violations advanced by the plaintiffs rise to a "constitutional dimension or gross violation of the [RLA]," *Internat'l Brotherhood of Teamsters,* 402 F.2d at 205, and therefore the Court lacks the power to grant the plaintiffs relief. The Court shall issue an Order of even date herewith in accordance with this opinion.

June 10, 1991

Charles R. Richey
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Continental Airlines, Inc., and Continental/Air Micronesia	)	
Plaintiffs,	)	
v.	)	Civil Action No. 91-796 (CRR)
National Mediation Board,	)	
Defendant.	)	

ORDER

In accordance with the Court's Opinion of even date herewith, it is, by the Court, this 10th day of June, 1991,

ORDERED that the Motion for Summary Judgment by plaintiff Continental Airlines shall be, and hereby is, denied; and it is

FURTHER ORDERED that the Motion for Summary Judgment by plaintiff Continental/Air Micronesia shall be, and hereby is, denied; and it is

FURTHER ORDERED that the defendant's Motion to Dismiss or for Summary Judgment shall be, and hereby is, granted; and it is

FURTHER ORDERED that the above-captioned case shall be, and hereby is, dismissed from the dockets of the Court.

Charles R. Richey
UNITED STATES DISTRICT
JUDGE

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

	18 NMB No. 13
In the matter of Representation of Employees	File No. C-6232 (Case Nos. R-5352 and R-5337)
of	
Continental Airlines, Inc. and Air Micronesia	FINDINGS UPON INVESTIGATION - TRANSFER OF CERTIFICATIONS
Flight Attendants	
	October 31, 1990

On September 13, 1989, the Union of Flight Attendants (UFA) and the International Association of Machinists & Aerospace Workers (IAM&AW) requested that the National Mediation Board (Board) transfer certifications issued to UFA in NMB Case Nos. R-5352 and R-5337 to the IAM&AW due to a merger of these two organizations. In those cases, UFA was certified to represent the craft or class of Flight Attendants, employees of Continental Airlines, Inc. and Air Micronesia, respectively. The request was made because UFA had merged into the IAM&AW.

The request was assigned NMB File No. C-6232. Senior Hearing Officer Roland Watkins was assigned to investigate the request.

PROCEDURAL HISTORY OF THE UFA/IAM&AW REQUEST

On September 15, 1989, the Board requested that UFA and the IAM&AW provide information on the merger. This information was submitted on October 20, 1989. Additional information was furnished on December 14, 1989, and June 14, 1990.

By letter dated July 17, 1990, the Board allowed Continental Airlines (Continental) , Transport Workers Union of America (TWU) and the Flight Attendants for Free Choice (FAFC) the opportunity to submit written comments on the IAM&AW's and UFA's request. In its letter, the Board noted that TWU, on March 18, 1988, filed an application alleging a representation dispute involving the Flight Attendants of Continental Holdings (Eastern Airlines and Continental Airlines). That application was assigned NMB File No. CR-6066.[1/] FAFC filed an application seeking to intervene in that case on April 26, 1988.

On August 2, 1990, Continental submitted written comments. The IAM&AW, on that same date, submitted additional comments. In a letter dated August 13, 1990, Air Micronesia commented on the IAM&AW's requests. More information was submitted by the IAM&AW on September 18, 24 and October 1, 5 and 19, 1990. No comments were submitted by either TWU or FAFC.

1/ This application was later dismissed without prejudice by the Board on August 17, 1990. *See*, 17 NMB 432 (1990).

CONTENTIONS

IAM&AW

The IAM&AW contends that UFA merged into the IAM&AW in 1984. The IAM&AW alleges that all of the Flight Attendants at Continental and Air Micronesia were informed of the merger agreement and allowed the opportunity to vote on ratification of the merger agreement. Upon approval of the merger agreement by the Continental and Air Micronesia Flight Attendants in 1984, the IAM&AW contends that UFA immediately became District Lodge 144 of the IAM&AW. The IAM&AW alleges that "the transfer of the certifications will thus recognize what has been the case for the past several years."

Continental

Continental alleges that the "results of the 1984 'election' are stale and unreliable." In addition, the Carrier alleges that "the IAM may not be certified because a majority of Continental employees now reject UFA-IAM representation." Finally, Continental alleges that UFA must surrender its certification as "it no longer represents Continental Flight Attendants." In this regard, Continental argues that the Board should "accept UFA's surrender of its certificate" and not "reissue" any certificate until after the Board has conducted an election.

Air Micronesia

Air Micronesia contends that the IAM&AW does not represent its Flight Attendants.

18 N.M.B. No. 13

FINDINGS OF FACT

UFA Certifications

Air Micronesia

On September 1, 1982, UFA alleged a representation dispute involving the Flight Attendants of Air Micronesia. The application was docketed as NMB Case No. R-5337.

The investigation disclosed that a dispute existed among the craft or class of Flight Attendants and the Board authorized an election by secret ballot to determine the employees' representation choice. A count of the ballots produced the following results:

Total eligible employees. . . .	22
Votes for UFA	11
Votes for any other organization or individual . . .	1

On November 3, 1982, UFA was certified to represent the craft or class of Flight Attendants at Air Micronesia. 10 NMB 54 (1982).

Continental Airlines

The services of the Board were invoked by UFA, on September 27, 1982, to investigate and determine who may represent for the purposes of the Railway Labor Act, as provided by Section 2, Ninth, thereof, personnel described as "Flight Attendants", employees of Continental including former employees of Texas International Airlines.

At the time the application was received, UFA represented Flight Attendants on Continental. 6 NMB 88

(1976). Former employees of Texas International Airlines were represented by the Association of Flight Attendants (AFA). 5 NMB 196 (1976).

The investigation disclosed that a dispute existed among the craft or class of Flight Attendants on the merged carrier and the Board authorized an election by secret ballot to determine the employees' representation choice. A count of the ballots produced the following results:

Total eligible voters	2807
Votes for UFA	1770
Votes for AFA	127
Votes for any other organization or individual	3
Void	19

As a result of the election, UFA was certified, in R-5352, to represent the craft or class of Flight Attendants of Continental on January 18, 1983. 10 NMB 126 (1983).

IAM&AW/UFA Merger Agreement Election

On February 23, 1984, UFA announced that it had entered into a merger agreement with the IAM&AW. The agreement stated that "it is expressly understood that the IAM Constitution shall be the governing document of the merged organization." The agreement also stated:

> Due to Continental Airlines' bankruptcy filing and the strike against Continental by UFA members, the IAM shall provide the District with $30,000 per month, beginning with the month in which this Merger Agreement

is ratified. Said subsidy shall include coverage of all District salaries for employees and business representatives, and other expenses related to the normal operation of the District.

. . . It is understood that the IAM assumes responsibility for fees and expenses related to representation in the current bankruptcy as well as all current outstanding litigation. It is expressly understood by the parties that all litigation shall be coordinated with the General Counsel of the IAM and the Air Transport Division. . .

It is understood by the parties to this merger agreement that upon ratification of said agreement, the District Lodge shall be assigned by the IAM to be responsible in accordance with IAM laws and policies for the negotiation and administration of all collective bargaining agreements governing members within its jurisdiction, including but not limited to, the present collective bargaining agreements, to wit the Flight Attendant agreements at Continental Airlines, Texas International Airlines and Air Micronesia. It is further

> understood that concurrent with the ratification of this merger agreement by a majority vote of the UFA membership voting by mail ballot, the present certifications and the present existing collective bargaining agreements shall be transferred into the name of the IAM.

On February 16, 1984, UFA sent the following telegram to John Adams, Vice President-Personnel, of Continental Airlines:

> The Union of Flight Attendants, Local #1, will soon be conducting an election by mail ballot among all Continental Flight Attendants concerning a merger with another labor organization. [UFA] wants everyone in the Flight Attendant class and craft represented in this election. It is our intent that all Flight Attendants participate in this vote, including those Flight Attendants hired subsequent to September 1, 1983.
>
> The election will be conducted in accordance with the Constitution and Bylaws of [UFA]. The Union has hired a neutral arbitrator to conduct the vote.
>
> The Union would like to make certain that our name and address

> roster is accurate and up-to-date. Please forward to the [UFA] offices in Los Angeles, the names and addresses of all Continental Flight Attendants, including those Flight Attendants who were not on the former CAL or former TXI Flight Attendant system seniority lists prior to September 1, 1983. [UFA] will be more than happy to provide personnel to meet with the company and assist in compiling this information. It is necessary that this information be received by February 24, 1984 in order for the Flight Attendants to receive ballots.

In a telegram addressed to UFA and dated February 24, 1984, Adams acknowledged UFA's request but refused to furnish the information. UFA again requested the names and addresses in a telegram dated February 29, 1984. In that telegram, UFA stated that "it is conducting a vote which we wish to have all Continental Flight Attendants participate in regarding (sic) a merger with another labor organization." UFA, in a letter, dated March 5, 1984, to Continental requested the names and addresses of all Continental Flight Attendants "to verify" addresses on file and "to make certain that the Flight Attendants who were hired by the Company on or after September 1, 1983 would receive ballots." In addition, UFA requested that certain enclosed notices "be posted in a prominent place in all Flight Attendant lounges and check-in facilities and on all Flight Attendant bulletin boards." The notice informed all Flight Attendants of the terms of the merger agreement and the ratification vote which

UFA was conducting. In a letter to UFA dated March 7, 1984, Continental refused to furnish the information. In that letter, Adams acknowledged that UFA sought "names and addresses of all active Continental Flight Attendants for use by UFA to conduct an election among Continental's Flight Attendants for the purpose of merging UFA into the IAM."

Without any assistance from Continental, UFA compiled a list of Flight Attendants from the seniority lists of Continental and Texas International. UFA had a seniority list and the addresses of all the Air Micronesia Flight Attendants. On March 1, 1984, UFA sent election ballots to all of the Continental and Air Micronesia Flight Attendants on its seniority lists. UFA's Code-a-Phone message for March 1, 1984, informed Flight Attendants of the mailing. Flight Attendants were reminded of the ratification process in Code-a-Phone messages on March 2, 6, 8 and 12, 1984.

With the ballot, UFA enclosed a letter from the UFA Executive Board and a return envelope addressed to the arbitrator. The letter from the UFA Executive Board accurately summarized the merger agreement. The Flight Attendants were instructed that the deadline for receipt of the ballot was March 20, 1984. The ballot stated:

> [ ] I vote FOR the merger between UFA and the International Association of Machinists and Aerospace Workers (IAM)
>
> [ ] I vote AGAINST the merger between UFA and the International Association of Machinists and Aerospace Workers (IAM)

The combined seniority lists contained a total of 2,706 names of which UFA obtained addresses for 2,615 individuals.

On March 26, 1984, Arbitrator William Levin counted all ballots received at the Post Office by the March 20, 1984, deadline. The arbitrator certified that 1,245 ballots were returned in a timely manner and of that amount 1,077 voted "FOR" and 158 voted "AGAINST" with 3 voting "no union". In a code-a-phone message for March 27, 1984, Flight Attendants were informed of the approval of the merger agreement.

UFA, on April 12, 1984, informed the IAM&AW that the Flight Attendants approved the merger agreement.

IAM&AW/UFA/AFA Article XX Proceeding

I.

Article XX of the Constitution of the American Federation of Labor and Congress of Industrial Organization (AFL-CIO), effective January 1, 1962, provides:

> Section 2. Each affiliate shall respect the established collective bargaining relationship of every other affiliate. No affiliate shall organize or attempt to represent employees as to whom an established collective bargaining relationship exists with any other affiliate...

The AFL-CIO Executive council, in a statement dated January 8, 1982, notified its members of the approval of the following policy statement concerning Article XX:

> ... The Council therefore determines that Article XX protection shall last for five years after the loss of representation rights that had been subject to such protection with the provisos: first, that the affiliate that had enjoyed that protection may seek and the Council may grant three-year extensions of this five-year period of protection; and second that any affiliate that had been found to have caused the loss of such representation rights shall continue to be forever barred by Article XX from seeking to secure those representation rights.

II.

On March 18, 1976, the Air Line Pilots Association (ALPA) and AFA requested that the Board transfer the certification issued to ALPA in R-3745 covering the craft or class of Flight Attendants, of Texas International Airlines to AFA. This request was made as a result of an Agreement, effective December 31, 1973, where the Steward and Stewardess Division of ALPA was reconstituted as AFA, an affiliate of ALPA. Based upon its investigation, the Board, on April 28, 1976, transferred the certificate from ALPA to "AFA affiliated with ALPA." 5 NMB 196 (1976).

UFA, on September 17, 1976, alleged a representation dispute involving the Flight Attendants of Continental. The employees had been represented by ALPA. After an election, the Board, on November 15, 1976, certified UFA as the representative of the Flight Attendants on Continental. 6 NMB 88 (1976).

In 1982, the operations of Texas International Airlines were merged into Continental. As noted above, the Board, in R-5352, certified UFA, on January 18, 1983, to represent the craft or class of Flight Attendants of Continental including former employees of Texas International Airlines.

In 1982 when the AFL-CIO amended its Constitution and Bylaws to establish the five year cap on Article XX protection, all its member unions were provided a one time opportunity to file a three year extension on any previously represented group to which they had Article XX rights. ALPA's Article XX rights to the Continental Flight Attendants would have expired under the new five year cap provision. However, ALPA "filed for the three year extension at the insistence of AFA."

On February 22, 1984, the AFL-CIO Executive Council voted to issue a charter to AFA as a full affiliate of the Federation. UFA, on February 29, 1984, announced its merger agreement with the IAM&AW. In a letter dated March 8, 1984, and addressed to the IAM&AW, AFA advised the IAM&AW that it may be in violation of Article XX.

In a letter to the AFL-CIO, dated March 22, 1984, officially charged the IAM&AW with a violation of Article XX.

Mediation of the dispute pursuant to the internal dispute resolution (Article XX) plan was unsuccessful. An impartial umpire held a hearing on July 11, 1984. The impartial umpire issued his determination on July 25, 1984. He determined that AFA did not have Article XX rights to the Flight Attendants at Continental and concluded that the IAM&AW did not violate Article XX. The impartial umpire datelined that the "acts of the International Association of Machinists complained of by the Association of Flight Attendants are not in violation of Section 2 of Article XX of the Constitution of the AFL-CIO."

AFA appealed the determination to the President of the AFL-CIO who referred the appeal to the Article XX Appeals Committee which has final authority. The Appeals Committee, on December 19, 1984, ruled that AFA did have Article XX rights to the Continental Flight Attendants and held that the IAM&AW was in violation of Article XX.

Because of this decision, the IAM&AW had to wait until the expiration of the five year period, which was in 1989, to file its transfer request with the Board. The five year period runs either from the date that the AFL-CIO affiliate lost the election or from the date of the complaint to the AFL-CIO. In this case, the latest date is that of AFA's letter to the AFL-CIO (March 22, 1989). At the expiration of the five year period in 1989, AFA did not seek an additional three year extension.

DISCUSSION

I.

The Board's investigation in this matter establishes that UFA was certified to represent the particular crafts or classes of employees for which a transfer of certifications has been requested.

Those certifications, NMB Case Nos. R-5337 and R-5352, dated November 3, 1982, and January 18, 1983, respectively, remain in effect.

II.

UFA merged into the IAM&AW in 1984. The UFA/IAM&AW merger process included an election among the Flight Attendants at Continental and Air Micronesia. Continental argues that the election process was a "sham." The Board finds that the election process afforded substantially all the employees at that time a reasonable opportunity to vote. UFA requested on numerous occasions that Continental furnish names and addresses so that the organization could mail a ballot to every eligible employee. Continental refused to furnish the information. UFA was able to compile a list of Flight Attendants on Continental and Air Micronesia and mailed ballots to 2,615 of the 2,706 individuals (Continental and Air Micronesia) or approximately 97% of the combined group. A majority of those voting approved the merger. Investigation revealed no evidence of any election irregularities. Furthermore, since 1984, UFA has operated as a District Lodge of the IAM&AW. The IAM&AW provides the funds for UFA to operate as a District Lodge.

III.

In the present case, the Board was not notified until 1989, of the merger which occurred in 1984. Because of the passage of time, the IAM&AW's and UFA's request required closer scrutiny by the Board. Investigation revealed that the IAM was barred by the Article XX matter from filing any request with the Board. After the expiration of the five year period, the IAM&AW and UFA did indeed file. In light of the Article XX proceeding the Board finds that the IAM&AW and UFA acted reasonably under the circumstances and, therefore, the Board accepts the request as being timely filed.

CONCLUSION

Based upon its investigation, the National Mediation Board hereby finds that UFA has merged into the IAM&AW and transfers the certifications issued to UFA in R-5352 (Continental) and R-5337 (Air Micronesia) to the IAM&AW.

By direction of the NATIONAL MEDIATION BOARD.

William A. Gill, Jr.
Executive Directive